IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1974
No. ____

JOSEPH DE LORRAINE,

Plaintiff-Petitioner,

-against -

MEBA PENSION TRUST, Representing the National Marine Engineers' Beneficial Association, and MILDRED E. KILLOUGH, Individually and in her capacity as Administrator of the MEBA Pension Trust,

Defendants-Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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(a) Decision of the Courts Below.

The first opinion of the district court is reported at 355 F. Supp. 89 (S.D.N.Y., 1973). The second and third opinions of the district court are not yet officially reported. The opinion of the Court of Appeals is not yet reported. All of the opinions are reproduced in the appendix

(b) Statement of the Grounds of Jurisdiction.

1. The decision of the Court of Appeals affirming the dismissal of this action by the district court was dated June 14, 1974, and was entered on June 14, 1974.

2. Jurisdiction to review the decision of the Court of Appeals in this case is conferred upon this court by 28 USC §1254.

(c) The Questions Presented for Review Are as Follows:

1. Do the Federal Courts have subject matter jurisdiction over claims by pension plan participants against the trustees of a joint employer-union pension plan created and operating under the authority granted by the Taft-Hartley Act §302(c)(5), 29 USC §186(c)(5)?

2. Do the prohibitions of the Age Discrimination in Employment Act of 1967, 29 USC §621ff, apply to the trustees of a Taft-Hartley Act Pension Plan if those trustees are acting as agents in fact for either the labor organization or the employers for a prohibited purpose?

3. Did the Court of Appeals act properly in granting summary judgment to the defendants below even though: the district court had explicitly revised an earlier decision awarding summary judgment and dismissed the case for lack of jurisdiction; the Court of Appeals explicitly declined to rule on the question of subject matter

jurisdiction; the defendants never moved for summary judgment; the plaintiff was entirely barred from conducting any pre-trial discovery; the action involves complex and novel questions of law and fact; the action involves questions of motive and intent of the defendants and their agents; and there are serious issues concerning many material facts in the case?

(d) The Statutes Which this Case Involves Are as Follows:

1. The Taft-Hartley Act §302, 29 USC §186:

> Restrictions on payments to employee representatives. (a) It shall be unlawful for any employer or association of employers or any person who acts as a labor relations expert, adviser, or consultant to an employer or who acts in the interest of an employer to pay, lend, or deliver, any money or other thing of value -
>
> (1) to any representative of any of his employees who are employed in an industry affecting commerce; ... (c) The provisions of this section shall not be applicable...(5) with respect to money or other thing of value paid to a trust fund established by such representative, for the sole and exclusive benefit

of the employees of such employer, and their families and dependents (or of such employees, families, and dependents jointly with the employees of other employers making similar payments, and their families and dependents): Provided, That (A) such payments are held in trust for the purpose of paying, either from principal or income or both, for the benefit of employees, their families and dependents, for medical or hospital care, pensions on retirement or death of employees, compensation for injuries or illness resulting from occupational activity or insurance to provide any of the foregoing, or unemployment benefits or life insurance, disability and sickness insurance, or accident insurance; (B) the detailed basis on which such payments are to be made is specified in a written agreement with the employer, and employees and employers are equally represented in the administration of such fund, together with such neutral persons as the representatives of the employers and the representatives of employees may agree upon and in the event the employer and employee groups deadlock on the administration of such fund and there are no neutral persons empowered to break

such deadlock, such agreement provides that the two groups shall agree on an impartial umpire to decide such dispute, or in event of their failure to agree within a reasonable length of time, an impartial umpire to decide such dispute shall, on petition of either group, be appointed by the district court of the United States for the district where the trust fund has its principal office, and shall also contain provisions for an annual audit of the trust fund, a statement of the results of which shall be available for inspection by interested persons at the principal office of the trust fund and at such other places as may be designated in such written agreement; and (C) such payments as are intended to be used for the purpose of providing pensions or annuities for employees are made to a separate trust which provides that the funds held therein cannot be used for any purpose other than paying such pensions or annuities; ...

2. The Age Discrimination in Employment Act of 1967, 29 USC §621ff, and particularly §§623(c), 623(f), 626(c), and 630(d), here set forth in relevant part:

623(c) It shall be unlawful for a labor organization - (1) to exclude or to expel from its membership, or

otherwise to discriminate against, any individual because of his age:
(2) to limit, segregate, or classify its membership, or to classify or fail or refuse to refer for employment any individual, in any way which would deprive or tend to deprive any individual of employment opportunities, or would limit such employment opportunities or otherwise adversely affect his status as an employee or as an applicant for employment, because of such individual's age;
(3) to cause or attempt to cause an employer to discriminate against an individual in violation of this section.

623(f) It shall not be unlawful for an employer, employment agency, or labor organization -...
(2) to observe the terms of a bona fide seniority system or any bona fide employee benefit plan such as a retirement, pension or insurance plan, which is not a subterfuge to evade the purposes of this Act, except that no such employee benefit plan shall excuse the failure to hire any individual; ...

626(c) Any person aggrieved may bring a civil action in any court of competent jurisdiction for such legal

or equitable relief as will effectuate the purposes of this Act [§§621 and notes-634 of this title]: Provided, That the right of any person to bring such action shall terminate upon the commencement of an action by the Secretary to enforce the right of such employee under this Act [§§621 and notes-634 of this title].

630(d) The term "labor organization" means a labor organization engaged in an industry affecting commerce, and any agent of such an organization, and includes any organization of any kind, any agency, or employee representation committee, group, association or plan so engaged in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours, or other terms or conditions of employment, and any conference, general committee, joint or system board, or joint council so engaged which is subordinate to a national or international labor organization.

c. Rule 56 of the Federal Rules of Civil Procedure:

SUMMARY JUDGMENT
(a) For Claimant. A party

seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in his favor upon all or any part thereof.
(b) For Defending Party. A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof.
(c) Motion and Proceedings Thereon. The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone

although there is a genuine issue as to the amount of damages.

(d) Case Not Fully Adjudicated on Motion. If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

(e) Form of Affidavits; Further Testimony; Defense Required. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or

certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

(f) When Affidavits are Unavailable. Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

(g) Affidavits Made in Bad Faith. Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant

to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused him to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.

As amended Dec. 27, 1946, eff. March 19, 1948; Jan. 21, 1963, eff. July 1, 1963.

(e) Statement of the Case.

This case involves a dispute between a Taft-Hartley Act Pension Plan Trust participant and the Administrator and Trustees of the plan. In the District Court, the defendant was awarded summary judgment based upon the complaint and its motion to dismiss and supporting affidavits. Following dismissal, the plaintiff, pursuant to court order, filed an amended complaint. The court then dismissed the action upon its determination that it lacked jurisdiction over the subject matter of the case.

Joseph DeLorraine (plaintiff-petitioner), is a marine engineer, and a participant in the defendant pension plan, the MEBA Pension Trust (hereafter the Pension Trust). The Pension Trust is financed by employer contributions pursuant to a collective bargaining agreement, and is thus subject to the Taft-Hartley Act provisions governing such plans, 29 USC §186ff. A major feature of this particular pension plan is that it has a "service only" retirement qualification: any member who has twenty years of credited service can retire at any time, regardless of age. The plaintiff met this requirement and stopped working first in 1964. At that time, the defendant maintained a "swinging door" retirement policy: retirees were permitted to return to active employment at any time with approval from the trustees (A-6).* Such approval was routinely given (A-6). In order to qualify for the "swinging door" program, workers had to remain available for work (A-7). The plaintiff relied upon this program when he

*References to Second Circuit Appendix filed by Plaintiff.

stopped working in 1964, and meticulously maintained his union membership and thus his availability for work as required by the regulations (A-7). In 1968, the plaintiff sought and obtained approval to return to active employment, and remained on active employment from 1968 to 1970 (A-7). In 1970, motivated by the desire of the union to minimize the number of older workers in favor of younger workers who would not be as concerned with retirement benefits (A-8) and who would benefit the union by paying school costs and initiation fees (A-8), the Pension Trust suddenly revoked the previously granted permission to return to work and ordered the plaintiff and others like him to stop working immediately upon pain of forfeiture of all pension benefit rights (A-8). The plaintiff stopped working under duress in 1972.

The plaintiff claims that the actions of the Pension Trust are unlawful in several respects. First, he claims that the practices described above constitute a violation of the Age Discrimination in Employment Act of 1967, 29 USC §621ff. Second, he claims that the plan as maintained by the Pension Trust violates the Taft-Hartley Act §302(c)(5), 29 USC §186(c)(5). Finally, he claims that the Pension Trust has violated its common law fiduciary duty toward him and that its conduct further gives rise to promissory estoppel. The federal court has only pendent jurisdiction over these claims, and they will not be discussed in detail as they do not relate to the jurisdictional issues raised on this appeal.

The District Court explicitly ruled that the federal courts do not have

jurisdiction over the plaintiff's Taft-Hartley Act claim (App.-27).* It also ruled that the Pension Trust did not come within the list of entities subject to the Age Discrimination in Employment Act (App.-6-8),*and said by way of dicta that even if the Pension Trust were subject to that Act, its retirement program was "reasonable" and thus came within the exception of 29 USC §623(f) (App.-9).

Notwithstanding these explicit rulings, and notwithstanding the clear impropriety of determining the many factual issues in summary fashion before the plaintiff had any opportunity to conduct pre-trial discovery (as argued repeatedly and forcefully both in the trial court and the court of appeals), the court of appeals chose to resolve all of the factual issues on the scant record before it, and ruled that it did not have to decide the important legal questions of federal court jurisdiction over the plaintiff's claims in view of the plaintiff's failure to "prove" these allegations in spite of the fact that he was denied the only means to do so.

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*References to appendix to this petition.

(f) The Bases for Federal Jurisdiction in the District Court are 28 USC §1331; 29 USC §626; and 29 USC §186(e).

(g) The Reasons for Allowance of the Writ.

1. Federal Court jurisdiction over claims by individual pension plan participants against trustees of a Taft-Hartley Pension Trust -

The question presented by this case is whether federal courts should take jurisdiction over claims by workers that the trustees of a pension trust fund operating under the Taft-Hartley Act §302(c)(5) have failed to adhere to the substantive statutory requirement that the plan be operated for the sole and exclusive benefit of the employees and their families. The petitioner claims that the trustees of the MEBA pension trust have manipulated and retroactively altered the pension plan requirements to exclude older workers in order to benefit the union and its officers. These actions constitute a violation of the substantive provisions of §302(c)(5) as interpreted by the federal courts. The question is whether the general policy in favor of national uniformity in the enforcement of federally created rights should be applied to give a liberal interpretation to §302(e).

Section 302 of the Taft-Hartley Act, 29 USC §186, prohibits payments by an employer to a labor organization. The primary concern of Congress in enacting this provision of the federal labor laws was to protect against collusion between employers and union representatives

to the detriment of the workers in the union. See United States v. Ryan, 225 F.2d 417, 426 (2d Cir. 1955), rev'd on other grounds 350 US 229, aff'd on remand, 232 F.2d 481 (1956). Exceptions to the general prohibition are granted only under carefully specified conditions. In the case of pension trust funds, the fund must be operated for the sole and exclusive benefit of the employees and their families; the funds must be held in trust; the detailed basis for the payments must be specified in the collective bargaining agreement; the fund must be jointly administered by employer and union representatives; and there must be an annual audit with the results available for inspection by interested persons. 29 USC §186(c)(5). All of these safeguards are designed to protect the worker from both the employer and the self-interested union representative.

The trust requirement of course imposes upon those who collect, hold and manage the fund the fiduciary obligations that run between a trustee and a beneficiary under local law. See Kosty v. Lewis, 319 F.2d 744 (DC Cir. 1963). In addition to these duties, the federal courts have consistently interpreted the requirement that the plan be for the sole and exclusive benefit of the employees and their families as imposing a separate and additional fiduciary obligation upon the trustees. The basic thrust of the many decisions to date is that the trustees of a Taft-Hartley pension trust fund must operate it in a manner designed to fairly take into account the interests of all the employees, and not for some purpose that will benefit the union, or the employers.

It is the petitioner's thesis that since the federal courts have already fashioned a considerable body of substantive law in applying this statutory language, federal courts are an appropriate forum for the enforcement of these federal rights. It is important then at this point to present in summary fashion a synopsis of the important substantive decisions in this area.

Pension plans have been found to violate the Taft-Hartley Act for failure to meet the requirement that they be for the sole benefit of the employees and their families on each of the following bases:

A. The plan's eligibility requirements exclude participants with a long work history in the industry, while including men with shorter service. Roark v. Lewis, 401 F.2d 425, 429 (DC Cir. 1968); see Sanchez Lugo v. The Employees Retirement Fund of the Illuminated Products Industry, 366 F. Supp. 99, 102 (ED NY 1973).

B. The plan excludes a large number of workers with no apparent reasonable purpose. Insley v. Joyce, 330 F. Supp. 1228, 1232 (ND Ill. 1971); see Sanchez Lugo, supra.

C. The plan regulations take away benefits already earned because of some occurrence beyond the control of the participant. Lee v. Nesbitt, 453 F.2d 1309 (9th Cir. 1972) [involuntary break in service after satisfying the length of service requirement for benefits]; see Roark v. Boyle, 439 F.2d 497, 501 (DC Cir. 1970).

While the federal courts have been consistent in holding the requirement that the plan be for the benefit of the employees and their families to impose an additional and unique fiduciary duty upon the trustees, there has been far less agreement on the question of federal court jurisdiction over such matters in the first instance. Lee v. Nesbitt, supra, one of the leading substantive decisions in the area, was in federal court on the basis of diversity of citizenship. The long line of cases in the District of Columbia,* perhaps together constituting the majority of decisions on this subject, do not discuss the jurisdictional aspect because the district court in those cases had general equitable jurisdiction in any event.

The policy of seeking national uniformity in the enforcement of the federal labor laws indicates a strong impetus to adopt a broad and liberal approach to the scope of federal court jurisdiction in this area. See Thompson, 9 Textbook for Welfare and Pension Trustees and Administrators, 440, 443 (1967). Thus far, however, the lower federal courts have for the most part concluded that:

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*Roark v. Boyle, 439 F.2d 497 (DC Cir. 1970); Collins v. UMW, 298 F.Supp. 969 (DDC 1970), aff'd 439 F.2d 494 (DC Cir. 1970); Kosty v. Lewis, 319 F.2d 744 (D.C. Cir. 1963), cert. denied, 375 U.S. 964 (1964); Sturgill v. Lewis, 372 F.2d 400 (DC Cir. 1966); Danti v. Lewis, 312 F.2d 345 (DC Cir. 1962); LaVella v. Boyle, 444 F.2d 910 (DC Cir. 1971); Roark v. Lewis, 401 F.2d 425 (DC Cir. 1968).

> Without guidance by the Supreme Court we do not have authority to establish such a federal common law for union-management negotiated pension fund agreements. Crawford v. Cianciulli, 357 F. Supp. 357 (ED Pa. 1973) at page 361.

The time is ripe to provide guidance to the federal courts in this crucially important area.

This court has established and re-affirmed the principle that federal courts have the authority and the responsibility for fashioning and enforcing a federal common law of labor relations. Boys Market, Inc., v. Retail Clerks Local 770, 398 US 235 (1970). In addition, as this court observed in Textile Workers Union v. Lincoln Mills of Alabama, 353 US 448 (1957):

> It is not uncommon for federal courts to fashion federal law where federal rights are concerned. See Clearfield Trust Co. v. United States, 318 US 363, 366-367 (1943) ...National Metropolitan Bank v. United States, 323 US 454 (1945) ...

That decision was re-affirmed in Lewis v. Benedict Coal Co., 361 US 459 , 496 (1960):

> Section 301 authorizes federal courts to fashion a body of federal law for the enforcement of collective bargaining agreements. (citations omitted)

The question before this court is whether these policies dictate that federal courts should exercise jurisdiction over violations of §302, either under the express grant of jurisdiction contained in §302(e) or under 28 USC §1331.

Pension funds created as a result of collective bargaining can exist only under the authority of the federal labor statutes. The numbers of workers and the amounts of monies involved are staggering. The potential impact upon national labor relations of a trustees' defalcation involving a major pension fund is a serious threat. Morrissey v. Curran, n.o.r., 69 Civ. 442, Bonsal, D.J. (SD NY, 1974); Sheridan, The Rise and Fall of Jimmy Hoffa, chap. 7 (1972). The national scope of such plans is obvious. It is illogical and unfair to permit the determination of a man's potential retirement benefits rights to vary with the state he may be working in, or to require the trustees of such a plan to deal with disputes in dozens of different jurisdictions. In short, in this enormously important area as perhaps in no other, this court should clearly enunciate the principle that the federal courts are the proper forum for the settlement of claims concerning a Taft-Hartley Act pension trust.

Notwithstanding the cogent and compelling reasons for a policy of per se federal court jurisdiction over disputes involving Taft-Hartley Pension Trusts, past decisions outside of the District of Columbia have failed to enunciate such a rule. In Porter v. Teamsters Health, Welfare, and Life Insurance Funds of Philadelphia, 321 F.Supp. 101 (ED Pa. 1970), the court analyzed the decisions as creating a distinction between cases alleging "structural violations" as opposed to those alleging violations of fiduciary duties or standards of prudence in the internal administration of the fund, holding that federal courts have jurisdiction over "structural violations."

In the case at bar, the district court adopted a narrow reading of this standard, and held that a structural violation conferring federal jurisdiction was only one found within the four corners of the original agreement to create the Pension Trust. In this the court differed from the analysis adopted in Porter: in that case, the court held that it had jurisdiction over a claimed conspiracy to divert trust funds to the use of the trustees, one which arose after the initial creation of the trust. Id, at page 104. The court said:

> Let us suppose...that a trust fund is created and initially administered in accordance with the structural requirements of §302(c)(5). If at some future point during the trust's existence it were either amended or administered in such a way as not to comply with those provisions, such

would be a structural violation over which this court would have jurisdiction under §302 Id. [emphasis added]

The District Court also differed in analysis from the approach adopted in Sanchez Lugo v. The Employees Retirement Fund of the Illumination Products Industry, 366 F. Supp. 99 (ED NY 1973). In that case, the court sustained federal jurisdiction over a claim that the eligibility requirements were arbitrarily exclusionary and a claim that the method of deciding disability pension applications denied due process to the claiment. The district judge reviewed the structure of the trust fund not only in terms of what was explicitly specified in the agreement, but also in terms of what was authorized by the agreement and later put into effect by the trustees under the powers conferred upon them. Under this more practical rule, Federal jurisdiction extends to a claim such as the one at bar, consistent with authority in other jurisdictions. Copra v. Suro, 236 F.2d 107, 115 (1st Cir. 1958); In Re Bricklayers Local #1 of Pennsylvania Welfare Fund, 159 F. Supp. 37 (ED Pa. 1958); Raymond v. Hoffman, 284 F. Supp. 596 (ED Pa. 1966); Upholsterer's International Union of North America v. Leathercraft Furniture Co., 82 F. Supp. 570 (ED Pa. 1949); Barbot v. Frackman, 191 F. Supp. 171 (SD NY 1961).

In the case at bar, petitioner has not claimed any structural defect in the original agreement or the trust instrument creating the fund. He does claim that at some point after the inception of the plan, the trustees acted in concert to revise the structure of the

plan with the intent of driving older workers out of the industry. The motivation for this course of action was threefold:

A. To decrease the number of marine engineers in the work force in order to reflect the decreased demand for such workers following the end of the war in Vietnam.

B. To increase the rate of turnover and thus increase the demand for the training program conducted by the Joseph Calhoon Training School (named for MEBA president and pension Trustee Joseph Calhoon), and also the initiation fees paid to the union by new members.

C. To force out older workers in favor of younger men who would not consider retirement benefits of any great importance, thus permitting the union to relax its demands in this area at contract time.

In short, the petitioner's case is based upon alleged manipulation of the pension trust not for the benefit of the employees and their families, but rather to further certain goals of the union and of management. This is precisely the kind of abuse which the statute was designed to prevent, and the Federal courts are appropriate tribunals for redress.

The Court of Appeals declined to rule upon the jurisdictional issue on the ground that the plaintiff had failed to make an adequate showing to avoid summary judgments on the merits. It is respectfully submitted that this was improper, as is more fully argued in section (g)(3) of this petition.

2. Jurisdiction under the Age Discrimination in Employment Act of 1967.

The Age Discrimination in Employment Act of 1967, 29 USC §621ff (hereafter the Age Discrimination Act) provides that it is unlawful for a labor organization

(1) to exclude or expel from its membership, or otherwise to discriminate against, any individual because of his age;
(2) to limit, segregate, or classify its membership, or to classify or fail or refuse to refer for employment any individual, in any way which would deprive or which would tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee or as an applicant for employment, because of such individual's age;
(3) to cause or attempt to cause an employer to discriminate against an individual in violation of this section.
29 USC §623(c).

This Act contains the following definition of a "labor organization":

The term 'labor organization' means a labor organization engaged in an industry affecting commerce, and any agent of such an organization...
29 USC §630(d) [emphasis added]

Finally, the Act provides that it is not unlawful for a labor organization or employer

> to observe the terms of a bona fide seniority system or any bona fide employee benefit plan such as a retirement, pension, or insurance plan, which is not a subterfuge to evade the purposes of this Act... 29 USC §623(f).

Reading these sections together, it is clear that the plaintiff's burden in this case is twofold: he must show that the Pension Trust is subject to the Act; and, he must show that the retirement policy does not come within the "bona fide retirement plan" exception to the Act. The District Court held that the plaintiff had failed in both respects.

In order to accomplish the result sought, the trustees enacted a resolution which provided:

1. All men working under authorization granted under the "swinging door" policy were to stop working immediately and permanently.

2. These men were required to resign from the union.

3. These men were required to surrender their merchant mariner's documents, without which they could not lawfully work at their occupation.

4. Failure to comply with these requirements would result in the permanent forfeiture of all pension rights.

The plaintiff alleged that the union representatives had unlawfully exerted their positions of the board of trustees in order to cause the adoption of the resolution.

These allegations clearly make out a relationship of Agency between the union and the Pension Trust. In Local No. 2 v. Paramount Plastering, Inc., 310 F.2d 179 (9th Cir. 1962), cert. denied 372 U.S. 944 (1963), the Court of Appeals held that a joint labor-management trust is both an "employee representative" for purposes of §§302(a) and (b) of the Taft-Hartley Act and a "Labor Organization" under the Wagner Act, 29 USC §152(5). In other words, the existence of an independent legal entity required by law to protect the fiscal integrity and fairness of an employee pension plan should not be construed to immunize the operation of such pension plans from judicial scrutiny of claims that there is in fact unlawful inter-action between the trustees and the union.

This claim is based upon well-established principles of common law relating to agency. An agent is defined in 2A CJS Agency §4(c) as:

> "[O]ne who, by the authority of another, undertakes to transact some business or manage some affairs on account of such other, and to render an account of it."

In evaluating the plaintiff's claim of agency, this court should examine the facts, not the labels. This is the approach utilized recently by the district court in Chastang v. Flynn & Emrich Co.,

365 F. Supp. 957 (D Md. 1973), upholding federal jurisdiction under Title VII of the Civil Rights Act of 1964, 42 USC §2000(e) et seq. Title VII is the model upon which the Age Discrimination legislation was based, and specifically resembles it in many respects. See Freed, "The Age Discrimination In Employment Act of 1967," National Clearinghouse Review, August, 1972, p. 196. The Age Discrimination in Employment Act, like Title VII of the Civil Rights Act, the National Labor Relations Act's §8, 29 USC §158, and the Fair Labor Standards Act, 29 USC §215(a)(3), is remedial in nature and should be liberally construed in favor of the Act's beneficiaries. See in general Pettway v. American Cast Iron Pipe Co., 411 F.2d 998, 1005-06 (5th Cir. 1969). The cited authorities should be read in terms of the policy and general approach they espouse, and should be applied to the case at bar.

No reason has been offered to buttress a claim that these actions, if independently undertaken by the trustees, could or did in any way benefit the beneficiaries of the trust, i.e., the plan participants. Obviously, the result was to the contrary in the petitioner's case. On the other hand, the actions are entirely plausible if one accepts the claim that the union was acting to achieve its goals through the Pension Trust.

The plaintiff has alleged the following motives for the abrupt revocation by the trustees of the "swinging door" policy in 1970:

1. The union president was on record as favoring younger members, because they would not be concerned about retirement benefits, a costly item at the

bargaining table.

2. The union favored a high turnover of members, because new members paid initiation fees and because apprentice applicants attended the Joseph Calhoun Training School.

3. The slowdown of the Vietnam conflict produced a sharp decrease in the need for marine engineers and the union wished to decrease the number of active workers.

Under these circumstances, the retirement plan is clearly a subterfuge designed to accelerate the retirement of older workers in favor of younger ones, and the Act's exception has no application. The plaintiff should have been accorded the opportunity to prove these allegations after full pre-trial discovery.

3. Impropriety of Disposing of this Case by Summary Judgment.

The district court dismissed this action for lack of subject matter jurisdiction (Opinion of Tyler, J., 11/20/73, p. 9 (App.-27)). The Court of Appeals explicitly declined to rule on the jurisdictional question because it felt that the record supported summary judgment in favor of the defendants (App.-35).
Summary judgment is totally improper in this case for the following reasons:

A. The jurisdictional questions have priorty.

B. The allegations of the complaint intrinsically involve motive and intent, and proof at trial will

necessarily involve the examination of hostile witnesses. Summary judgment is not a satisfactory means of disposing of issues of this kind.

C. This case involves complex and novel factual and legal issues and theories of recovery.

The defendants never moved for summary judgment. They moved to dismiss, and submitted supporting affidavits. The district court originally granted summary judgment, but later vacated this decision and ultimately dismissed for lack of jurisdiction. In the Court of Appeals, the defendants argued only that summary judgment was appropriate on the claim of age discrimination. Neither side briefed or argued the propriety of summary judgment on the other claims in the Court of Appeals. Nevertheless, the Court of Appeals held that summary judgment on all Federal claims was appropriate, and accordingly declined to reach the jurisdictional issues. (App.-35-36). The errors of law involved in this determination will be discussed under the three subdivisions outlined above.

A. The jurisdictional questions have priority.

As Judge Tyler stated, "The first issue to which this court must address itself is that of jurisdiction." (Opinion of Tyler, J., 11/20/73, p. 9 App.- 19). A crucial distinction between what have been called matters in bar and pleas in abatement must be made in considering whether to treat a motion to dismiss under Rule 12 as a motion for summary judgment under Rule 56. Since

summary judgment is a determination on the merits, it is particularly inappropriate in deciding questions of jurisdiction over the subject matter of the action. This point is clearly put in Moore's treatise on Federal Practice, 2d Ed. (1974), Vol. 6, ¶56.03:

> "Matters in abatement should normally be raised by a pre-pleading motion or in the responsive pleading in accordance with Rule 12(b) and not by a motion for summary judgment. Thus lack of jurisdiction over the subject matter should be raised by a motion to dismiss or in the responsive pleading, and not by a motion for summary judgment." (Ibid, pp. 2052-53)

Indeed, as the treatise points out (Ibid, p. 2052, fn. 5), Rule 12(h) specifically provides that whenever it appears that the court lacks jurisdiction over the subject matter, it should dismiss the action. This distinction has heretofore been clearly understood and adopted by the Federal courts. See Rosemound Sand & Gravel Co. v. Lambert, 469 F.2d 416, 417-18 (5th Cir. 1972); Jones v. Brush, 143 F.2d 733, 735 (9th Cir. 1944); Riley v. Titus, 190 F.2d 653, 655, n. 1 (DC Cir. 1951) cert. denied 342 U.S. 855 (1951); Gallogly v. Bakery and Confectionary Workers Int'l Union, 180 F. Supp. 778, 781 (D RI 1960); Kantor v. Comet Press Books Corp., 187 F. Supp. 321 (SD NY 1960); Navios Corp. v. National Maritime Union of America, 236 F. Supp. 657, 659 (ED Pa. 1964); Miller v. National Maritime Union, 275 F. Supp. 809, 810 (ED Pa. 1967).

Clearly under the applicable authorities summary judgment is particularly inappropriate when used as a means of avoiding the issue of jurisdiction over the subject matter.

B. The plaintiff's allegations concerning motive and intent.

The plaintiff claims that the defendants, in passing the 1970 resolution retroactively revoking the plaintiff's right to return to work, in fact intended to discriminate against older workers and were motivated by considerations that were contrary to the best interests of the pension fund participants. In cases so crucially involving motive and intent, the courts have recognized that summary procedures are generally an inadequate substitute for a full trial and cross-examination of witnesses. A leading case in the analagous area of anti-trust law is Poller v. CBS, 368 U.S. 464 (1962), wherein this Court said:

> "We believe that summary procedures should be used sparingly in complex antitrust litigation where motive and intent play leading roles, the proof is largely in the hands of the alleged conspirators, and hostile witnesses thicken the plot." at p. 473.

To the same effect, see Fortner Enterprises v. US Steel, 394 U.S. 495 (1969).

The reason for this approach to complex cases in such areas as anti-trust and civil rights [see e.g., Dombrowski v. Eastland, 387 U.S. 82 (1967)]

is clear enough: the right to cross-examination is sacrificed in summary procedures, and this should not be permitted unless there is clearly no factual dispute. As this Court held in Poller v. CBS, supra:

> "It is only when the witnesses are present and subject to cross-examination that their credibility and the weight to be given to their testimony can be appraised. Trial by affidavit is no substitute for trial by jury which has long been the hallmark of 'even handed justice'." (Ibid at p. 473.)

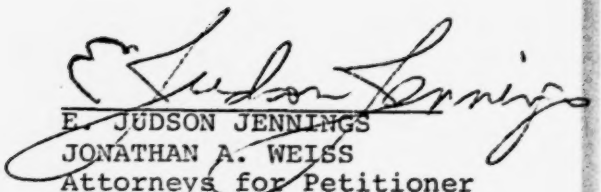
The task of the court in considering whether to grant summary judgment is not to accept as true the allegations of the affidavits. As has been argued above, the conversion of the defendants' motion to dismiss for lack of jurisdiction into one for summary judgment merely because of the presence of affidavits is inappropriate. However, even if it were proper, the standard for deciding the motion for summary judgment is still the same: if there is any issue as to any material fact, or if there is any question that the moving party is entitled to judgment as a matter of law, summary judgment must be denied. Carter v. Stanton, 405 U.S. 669 (1972); Adickes v. S. H. Kress and Co., 398 U.S. 144 (1970). In Fortner Enterprises v. US Steel, cited above, the court noted that "(i)t may turn out that the arrangement involved here serves legitimate business purposes..." but declined to approve summary judgment because of the possibility that the opposite was true. Similarly,

in this case it is the defendants' contention that they were merely following permissable purposes in passing the resolutions. But the plaintiff alleges the opposite, and is entitled to an opportunity to prove it even through hostile witnesses.

C. The case involves complex and novel theories of recovery.

In addition to the complexity of the factual issues, the importance of motive and intent, and the crucial aspect of credibility of witnesses, there are in this case novel and substantial questions involving the interpretation of the Taft-Hartley Act and the Age Discrimination in Employment Act of 1967. These issues turn in part upon the facts. For example, the Age Discrimination in Employment Act is directed toward labor organizations and their agents. 29 USC §630(d). The question of agency in this case is a mixed question of law and fact (see point 2, supra). Such important determinations should not be made on the basis of mere affidavits submitted in an initial attack upon the jurisdiction of the court. See Perry v. Sindermann, 408 U.S. 593 (1972).

In summary, this case is particularly inappropriate for summary disposition, particularly in view of the fact that the defendants themselves have initially attacked the jurisdiction of the Federal courts over the plaintiff's claim. For all these reasons, this Court should grant the petition for a writ of certiorari.



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APPENDIX

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

JOSEPH DeLORAINE,

Plaintiff,

-against-

MEBA Pension Trust, representing the National Marine Engineers' Beneficial Association; and Mildred Killough, individually and in her capacity as Administrator of the MEBA Pension Trust,

Defendants.

E. JUDSON JENNINGS, ESQ., Legal Services for the Elderly Poor, New York City, Attorney for Plaintiff.

PROSKAUER, ROSE, GOETZ & MENDELSOHN, ESQS., New York City, by Morton M. Maneker and David A. Leff, Attorneys for Defendants.

OPINION

72 Civ. 4427 HRT

TYLER, D.J.

Pleading that he is a marine engineer who wishes to return to work, plaintiff has sued MEBA Pension Trust, alleged to represent members of the National

Marine Engineers' Beneficial Association, and its administrator, to recover compensatory and punitive damages. Basing his claims on The Age Discrimination in Employment Act of 1967, 29 U.S.C. §§621 et seq., plaintiff asserts that defendants in 1970, under regulations adopted by MEBA Pension Trust, improperly treated his decision to "temporarily" retire in 1964 as "permanent and binding." Defendants have moved for summary judgment on the grounds, inter alia, that this suit is time-barred as a matter of law, that neither defendant comes within the scope and sanctions of the 1967 statute and that as a matter of record plaintiff voluntarily and finally retired in 1964. Plaintiff has cross-moved for partial summary judgment on the issues of liability.

According to plaintiff, he is presently 54 years of age and fully qualified

and fit to handle a position as a marine engineer. In 1964, he had accumulated twenty years of pension time under his union's pension plan. Thus, at age 46, he retired, and signed the following document.

"DECLARATION OF RETIREMENT FROM

MARITIME INDUSTRY

> I, Joseph De Loraine, hereby certify that I have withdrawn and shall remain completely withdrawn during my retirement from any employment aboard any vessel documented under the laws of the United States or aboard any vessel covered by any collective bargaining agreement with the Association and any employment in the Association Locals or Plans.
>
> * * *
>
> A return to employment as noted above, without written permission from the Trustees, shall be penalized in accordance with MEBA Pension Trust Regulations."

The relevant regulations provided in 1964, and so provide today, that, to be eligible for a pension, an employee must completely retire; return to employment without

penalty is possible only if permission to do so is given by the Trustees. The regulations are silent, however, as to whether such permission may subsequently be withdrawn by the Trustees.

In 1968, with the permission of the Trustees of MEBA, plaintiff returned to work after having collected pension benefits since 1964. Upon return to work, his pension payments stopped. Then, in 1970, as plaintiff asserts, "...the pension regulations were amended, to provide that my election to stop work temporarily in 1964 was permanent and binding, and further overruling and nullifying the decision in 1968 to permit me to return to full-time active employment." More precisely, the Trustees passed a resolution in December of 1970, purporting to revoke the permission previously granted to all persons who had so requested to return to employment covered by the

pension regulations.

After reciting these facts, plaintiff alleges that although the 1970 regulation changes were "technically promulgated by the board of trustees" of MEBA, eight of the board members were union representatives, one of whom, the union president, was and is the chairman of the board. Thus, in effect, plaintiff claims that the union rammed through the regulation changes in 1970 for the purpose of discriminating against "older workers" such as himself, although he names neither the union nor its representatives as defendants in this suit. Defendant Killough, as Administrator of the Trust, flatly denies that she or the Trust is the agent of any employer or employee organization, or that the regulations in 1970 were motivated as alleged.

The Age Discrimination in Employment

Act of 1967, 29 U.S.C. §§621 et seq., prohibits discrimination because of age by employers, employment agencies, and labor organizations. Plaintiff, in his brief in opposition to defendants' motion for summary judgment herein, argues forcefully that the defendant pension trust is a labor organization, or at least has discriminated "acting by and with the union and its representatives" in the manner challenged. He asserts, moreover, that retirement plans are subject to the prohibitions of the act, citing Hodgson v. American Hardware Mutual Insurance Co., 329 F. Supp. 225 (D. Minn. 1971).

The statutory language, which is reasonably clear, indicates that the pension trust in question is not a labor organization in this context. Section 630(d) reads:

> "The term 'labor organization' means a labor organization engaged in an industry-affecting commerce, and any agent of such an organization, and includes any organization of any kind, any agency, or employee representation committee, group, association, or plan so engaged in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours, or other terms or conditions of employment, and any conference, general committee, joint or system board, or joint council so engaged which is subordinate to a national or international labor organization." (underscoring added)

Neither party has been able to cite any cases applying this section to pension trusts. While pensions are undoubtedly considered a term of employment, it is difficult to understand how this pension trust has as its purpose "dealing with employers" in such matters--the "dealing" indicating some negotiating or adversarial process.

More importantly, section 623(f) of the statute provides:

> "It shall not be unlawful for an employer, employment agency, or labor organization - -
> (1) ...
> (2) to observe the terms of a bona fide seniority system or any bona fide employee benefit plan such as a retirement, pension, or insurance plan, which is not a subterfuge to evade the purposes of this chapter, except that no such employee benefit plan shall excuse the failure to hire any individual...."

The Hodgson case, supra, relied upon by plaintiff, concerned an action brought by the Secretary of Labor, challenging an employer's policy of applying the terms of a voluntary retirement benefit plan, requiring retirement for females at 62 and males at 65, to all non-participating employees. It was this requirement that workers under 65 who were not participating should retire which was found to be invalid, since it violated the statute's mandate that "[i]t shall be unlawful for an employer...to discharge any individual ...because of such individual's age."

The court went on to note that, "Retirement at age sixty-two for Plan members is permitted only because it is pursuant to the Plan." 329 F. Supp. at 228. This was found to come within the exception of §623(f)(2); on the other hand, the court upheld an interpretative [sic] bulletin promulgated by the Secretary of Labor, providing that "[t]his exception does not apply to the involuntary retirement before 65 of employees who are not participants in the employer's retirement or pension program."

This would seem to dispose of the action. Plaintiff has not persuasively argued that pension trusts fall within the prohibition of the Act; rather, the case he cites holds only that an employer may not utilize a retirement plan to prematurely retire non-participating employees. Even if the defendant pension trust here were to be considered a labor organi-

nation, which I think most unlikely, the exception to the statute is still clearly applicable. Plaintiff has made no factual showing that the Trustees were acting as agents of the union in passing the resolution in 1970 revoking his permission to return to work. He asserts only that "I believe that the regulation amendment was proposed by the union for the sole purpose of discriminating against older workers like myself, forcing us into unwanted permanent retirement to permit the union to recruit new members who would pay high initiation and training fees to join the union." Affidavit of plaintiff, verified on the 9th of January, 1973, at p. 2. Moreover, it is difficult to understand how the eight union members on the board of trustees would be so motivated to "discriminate" against their co-workers.

Plaintiff's mere conclusory allegations of union control and discrimination cannot suffice to withstand defendant's motion for summary judgment. More than a difference of opinion must be demonstrated: "the rule requires that the opposing party present some evidence which supports the bald assertion that there is a dispute." Donnally v. Guion, 467 F.2d 290, 293 (2d Cir. 1972). Accordingly, it is not necessary to reach the other issues posited by defendants' motion, which is hereby granted for the reasons stated above. Plaintiff's cross motion is denied. Let judgment be entered dismissing the action. It is so ordered.

Dated: February 21, 1973

/s/ H.R. Tyler, Jr.
U.S.D.J.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

JOSEPH DeLORAINE,

Plaintiff,

-against-

MEBA Pension Trust, representing the National Marine Engineers' Beneficial Association; and Mildred Killough, individually and in her capacity as Administrator of the MEBA Pension Trust,

Defendants.

MEMORANDUM

72 Civ. 4427 HRT
#39538

TYLER, D.J.

By way of opinion filed February 21, 1973, this court granted defendant's motion for summary judgment, and ordered the above-captioned action dismissed. On March 8, 1973, plaintiff filed a "notice of motion to alter or amend a judgment and for leave to serve and file an amended complaint, on March 27, plaintiff filed a notice

of appeal from the order of dismissal, having in the interim secured an adjournment of his pending motion. In addition to opposing the motion, defendants have cross-moved to dismiss the amended complaint, pursuant to Rule 12(b)(6), F.R. Civ. P., in the event that it is granted.

Plaintiff's motion is made pursuant to Rule 15 and 59, F.R. Civ. P., "on the ground that justice so requires." As the caption to plaintiff's supporting memorandum indicates, the motion seeks to vacate the judgment, rather than to alter it, so that an amended complaint can be filed. Defendants contend that the motion raises no new issues of fact, and plaintiff does not seriously contest the judgment dismissing the original complaint. Rather, the motion is seemingly grounded on the merits of the amended complaint, which adds the Marine Engineers' Beneficial Association

(the Union) as a party defendant, and "contains an expanded and more detailed statement of several theories of action under federal and state law." Memorandum of plaintiff in support of motion, at p. 2. Parenthetically, it should be noted that the proposed amended complaint does not include in its caption the Union as a defendant, but I regard this as no more than an oversight or inadvertence.

At the threshhold, defendants contend that this court is without jurisdiction to entertain plaintiff's motion because of a pending appeal. This contention is without merit, since "[a] motion to alter or amend a judgment under Rule 59(e) that is served not later than 10 days after entry of judgment destroys the finality of the judgment for purposes of appeal." 6A Moore's Federal Practice ¶59.13[4] at 3887 (2d ed. 1972). Plaintiff has emphasized, moreover, that his appeal is merely

precautionary. And as Judge Gurfein has recently ruled, "[t]he cautionary filing of an appeal by the plaintiff does not divest this court of jurisdiction." Sampson v. Ampex Corporation, 335 F. Supp. 242, 246 (S.D.N.Y. 1971), aff'd 463 F.2d 1042 (2d Cir. 1972).

The amended complaint seeks to remedy the defects found by the undersigned to inhere in the oritinal complaint. I am inclined to grant the motion to vacate the judgment and to permit the amended complaint, if for no other reasons than because defendants would not be greatly prejudiced and because the jurisdictional defects noted in this court's previous opinion might conceivably be cured. Such relief is placed firmly within the discretion of this court to grant. 6A Moore's Federal Practice, supra, ¶59.12[1] at 3878-9. And Rule 15(a) directs that leave to amend "shall be freely given when justice so requires."

Although there is mixed authority for refusing leave to amend a complaint which is jurisdictionally defective even after the proposed amendment, 3 Moore's Federal Practice, ¶15.08 at 902-906 (2d ed. 1972), defendants do not raise the issue. And I believe the wiser course is to vacate judgment, grant leave to amend, and then consider defendants' motion to dismiss. Since plaintiff has submitted an additional two page affidavit, and material outside the pleadings had been previously submitted, defendants' current motion to dismiss under Rule 12(b)(6) shall be treated as one for summary judgment pursuant to Rule 56, F.R. Civ. P. The parties shall have 14 days from the filing of this memorandum to tender whatever other submissions they care to in respect to the summary judgment motion.

It is so ordered.

Dated: June 5, 1973

/s/ H.R. Tyler, Jr.
J.S.D.J.

UNITED STATES
DISTRICT COURT

TYLER, D. J.

OPINION #40045

This is a motion to dismiss for failure to state a claim upon which relief can be granted. 12(b)(6)F.R.Civ.P. Familiarity with the facts at issue will be assumed since this court has already decided two prior motions in this same case. DeLoraine v. MEBA Pension Trust, Civil No. 72-4427 (S.D.N.Y., filed June 8, 1973); DeLoraine v. MEBA Pension Trust, 355 F. Supp. 89 (S.D.N.Y. 1973). A brief procedural history, however, will be helpful in putting this case in perspective.

On February 21, 1973, this court granted defendants' motion for summary judgment, DeLoraine v. MEBA Pension Trust, 355 F. Supp. 89 (S.D.N.Y. 1973). It was there held that the defendant pension

trust was not a labor organization within the meaning of the Age Discrimination in Employment Act of 1967, 29 U.S.C. §§621 et seq. (1973 Supp.), and that in any case, the pension trust came within the exception of §623(f)(2) of that Act. Pursuant to Rules 15 and 59, F.R.Civ.P., plaintiff moved to "alter or amend" the judgment and for leave to serve and file an amended complaint. Defendants opposed the motion and, in addition, cross-moved under Rule 12(b)(6) to dismiss the amended complaint. On June 8, 1973, this court vacated judgment, granted leave to amend and deferred consideration of defendants' motion to dismiss. It is this motion which is now before the court. Since matters outside this pleading have been presented, however, this motion must be treated as one for summary judgment under Rule 56, F.R. Civ.P.

In his amended complaint, plaintiff reiterated his claim under 29 U.S.C. §621 et seq., and also alleged a cause of action under 29 U.S.C. §§157 and 158(b)(1)(a). At argument, however, plaintiff conceded that his only real claim arises under §302 of the Taft-Hartley Act ("the Act"). 29 U.S.C. §186(c)(5) (1973 Supp.), as amended Aug. 15, 1973, Pub. L. 93-95, 93rd Cong., 1st Sess. For the reasons hereinafter stated, this action is dismissed for lack of subject matter jurisdiction.

The first issue to which this court must address itself is that of jurisdiction.[1] Paragraphs (a) and (b) of §302 make it unlawful for an employer to make payments to representatives of his employees and for the representatives to receive payments. Paragraph (e) gives

1. See attached Appendix

the district court jurisdiction to restrain violations of §302 without regard to the restrictions imposed by §§ 6 and 20 of the Clayton Act (15 U.S.C. §17; 29 U.S.C. §52) or the bar of the Norris-LaGuardia Act (29 U.S.C. §§101-115). There is no dispute that payments have been made within the meaning of subsections (a) and (b) of §302. Subsection (c), however, carves out eight exceptions to the broad prohibitions of subsections (a) and (b) and it is defendants' contention that the payments were permitted by the fifth of these exceptions, §302(c)(5), which protects payments to certain types of trust funds.

In order to qualify as a §302(c)(5) trust fund, the pension fund must fulfill five structural requirements.[2] Defendants have admittedly met these requirements. In addition, however, the fund must also have been established for the sole and

exclusive benefit of the employees and their dependents. It is this requirement which is at issue in this case. Unlike the other provisions of §302(c)(5), this requirement is couched in general terms and comes in the preamble of that subsection. Nevertheless, it has been held to be a condition that must be complied with if the employer's payments are to be exempted from the prohibitions of subsections (a) and (b). Lee v. Nesbitt, 453 F.2d 1309 (9th Cir. 1972); Powers v. Ulplano Canal Inc., 393 F.2d 421 (1st Cir. 1968); Lugo v. The Employees Retirement Fund of the Illuminated Products Industry, Civil No. 73-663 (E.D.N.Y., filed Oct. 12, 1973) (hereinafter "Lugo"); Fiorelli v. Kelewer, 339 F. Supp. 796 (E.D. Penn. 1972), aff'd 474 F.2d 1340 (3d Cir. 1973).

Since the requirement is framed in such general terms, a problem of definition has

arisen. The courts have limited the application of this subsection, however, and held that it does not create an independent body of federal trust law; rather, it is limited to insuring compliance with the structural requirements of §302(c)(5). Bowers v. Ulplano Canal Inc., supra; Insley v. Joyce, 330 F. Supp. 1228 (N.D. Ill. 1971).

Plaintiff has alleged generally in his complaint and specifically in his briefs that this trust was not administered for the sole and exclusive benefit of the employees. In order for this court to have jurisdiction, however, it must be alleged that the trust was not "established" for the sole benefit of the employees. The focus of the court, thus, must be on the agreement between the employer and the union pursuant to which the pension trust was created. Plaintiff

does not allege any impropriety in this agreement. In essence, plaintiff is complaining of the trustees' resolution of 1970 in which the permission previously granted to persons to return to work was revoked. Plaintiff asserts that this resolution was motivated by the defendants' desire to force out present workers and replace them with new workers from whom MEBA would receive an initiation fee of one thousand dollars. (Amended Complaint §17).

While the passage of such a resolution may have been a breach of the trustees' fiduciary duty, it cannot be considered to be a breach of the structural requirements of §302(c)(5). Plaintiff, however, has argued that if a trust is misadministered at a point in time subsequent to its creation, this misadministration may rise to the dignity of a structural

defect. (See Lugo, supra; Porter v. Teamsters Health, Welfare and Life Insurance Funds, 321 F. Supp. 101, 104 (E.D. Penn. 1970); but see, Fiorelli v. Kelewer, supra at 801.)

In Lugo, supra, the court took jurisdiction of plaintiff's claim that the procedures used by the trustee in determining eligibility denied him due process. Judge Bartels equated arbitrary and exclusionary activity on the part of the trustees with the existence of an express exclusionary provision in the trust itself because, as a practical matter, "the result in both cases is exclusion of employees from the benefits of the trust." Lugo, supra at p. 10. The only cases which were cited in support of this analysis were cases in courts of the District of Columbia. Due to an historical peculiarity, however, these courts

were not limited by restrictions on federal jurisdiction since they were functioning in their dual capacity. Cf. Palmers v. United States, 411 U.S. 389 (1973).[3] Moreover, the fact that a trust fund is improperly structured rather than misadministered may well have practical consequences. Only in the former case are the activities of the trustees to some extent sheltered by the provisions of the contract entered into by the employer and the employees' representatives. If a pension trust is established in accordance with the provisions of §202(c)(5), a trustee who has breached his fiduciary duty will be unable to defend himself by alleging that his conduct was authorized by the terms of the agreement which created the trust. In state suits, this could well be an important factor.

Even if Lugo were followed, however, this court would still lack jurisdiction. Recognizing that the Second Circuit might well take a narrower view of its jurisdiction, Judge Bartels limited his finding of jurisdiction to those cases where the trust fund authorizes its trustees to arbitrarily and capriciously exclude certain employees from eligibility. In this case, there are no allegations that the trust fund agreement contained any illegal provisions.

If the misadministration of a pension trust were sufficient to confer jurisdiction under §302(c) upon the federal courts, a federal law of pension plans would inevitably result. Every breach of fiduciary duty, whether it be financial mismanagement or discriminatory application, can properly be considered to lead to a pension fund which is not being administered for the sole and exclusive

benefit of the employees.[4] To create a whole new area of federal jurisdiction and federal law would be contrary to the accepted restrictive interpretation given §302(c)(5) by the courts. (Bowers v. Ulplano Canal Inc., supra; Lugo, supra; Insley v. Joyce, supra), as well as to the Congressional purpose in enacting this section.[5] It may well be that pension trusts should be regulated by federal law; indeed, there are indications that Congress is currently considering just such measures.[6] That decision, however, is one which should properly be made by Congress, not by this court.

Since no structural defect in the establishment of this pension trust has been alleged, this court lacks subject matter jurisdiction to hear this complaint. This case is therefore dismissed. It is

so ordered.

Dated: November 20th, 1973

/s/ H. R. Tyler, Jr.
U.S.D.J.

FOOTNOTES

1. Although a motion for summary judgment does not go to the issue of jurisdiction, pursuant to Rule 12(b), F.R. Civ.P., this court is empowered to dismiss an action at any point if it determines that it lacks subject matter jurisdiction.

2. In substance, these requirements are that:

(1) payments must be held in trust to pay, from principal or income, for employees' medical care, pensions, illness, etc.;
(2) the detailed basis of such payments must be specified in writing;
(3) employees and employers must be equally represented and there must be a neutral person or umpire to break deadlocks;
(4) there must be provisions for an annual audit; and
(5) separate trusts for pension and annuity funds must be provided.

3. Interestingly enough, in one of the few D.C. labor cases in which jurisdiction was discussed, the court held that it had jurisdiction under its general equity powers and also under a third party beneficiary theory. Kennet v. United Mineworkers of America, 183 F. Supp. 315 (D. D.C. 1960).

4. It could be argued that a distinction exists between those cases in which eligibility is denied and those in which mere improper management is alleged. Both situations, however, result equally in a pension which is no longer being adminis-

tered for the sole and exclusive benefit of the employees.

5. An examination of the legislative history of this section shows that its general purpose was to prevent corruption in collective bargaining. See, generally, Bowers v. Ulplano Canal Inc., supra; United States v. Ryan, 225 F.2d 417, 427 (2d Cir. 1965) (dissenting opinion), rev'd 350 U.S. 299 (1956). Furthermore, as a matter of common sense, it seems hardly likely that Congress intended to back into the creation of a federal law of pension trusts by means of a fifth exception to a general prohibition on payments to the representatives of employees.

6. See, e.g. H.R.'s 9469, 9464, 9458, 7747, 976, & 406, 93rd Cong., 1st Sess. (1973).

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 973—September Term, 1973.

(Argued May 8, 1974 Decided June 14, 1974.)

Docket No. 74-1096

JOSEPH DE LORAINE,

Plaintiff-Appellant,

—against—

MEBA PENSION TRUST, Representing the National Marine Engineers' Beneficial Association, and MILDRED E. KILLOUGH, Individually and in her capacity as Administrator of the MEBA Pension Trust,

Defendants-Appellees.

Before:

ANDERSON, FEINBERG and MANSFIELD,

Circuit Judges.

Appeal from judgment of United States District Court for the Southern District of New York, Harold R. Tyler, Jr., *J.*, which dismissed complaints purporting to assert claims under the Age Discrimination in Employment Act, 29 U.S.C. §§ 621 et seq., and section 302 of the Taft-Hartley Act, 29 U.S.C. § 186.

Judgment affirmed.

E. JUDSON JENNINGS, New York, N.Y. (Legal Services for the Elderly Poor, on the brief) *for Plaintiff-Appellant.*

MORTON M. MANEKER, New York, N.Y. (Proskauer Rose Goetz & Mendelsohn, Robert J. Jossen, on the brief) *for Defendants-Appellees.*

NATIONAL SENIOR CITIZENS LAW CENTER, ROBERT B. GILLAN, Los Angeles, Calif., *as Amicus Curiae.*

FEINBERG, *Circuit Judge:*

Plaintiff Joseph de Loraine, a marine engineer, voluntarily retired from his trade in 1964 after 20 years service. He was then 46 years old. At the time, plaintiff signed a statement which described his retirement as permanent and recognized that any return to employment in the maritime industry without permission of the Trustees would entail forfeiture of his pension rights.[1] Plaintiff thereafter re-

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1 The text of the statement was as follows:

> I, Joseph de Loraine, hereby certify that I have withdrawn and shall remain completely withdrawn during my retirement from any employment aboard any vessel documented under the laws of the United States or aboard any vessel covered by any collective bargaining agreement with the Association and any employment in the Association Locals or Plans.
>
> A return to employment, as noted above, without written permission from the Trustees, shall be penalized in accordance with the MEBA Pension Trust Regulations.

At the time of de Loraine's 1964 withdrawal from the industry, the MEBA Pension Trust regulations provided:

> . . . Retirement defined. To be considered retired an employee must withdraw completely from any further employment aboard any vessel documented under the laws of the United States or aboard any vessel covered by any collective bargaining agreement of the Association.

ceived regular pension payments from defendant MEBA Pension Trust. In 1968, during a period of increased demand for marine engineers resulting from the Viet Nam war, the Trustees granted plaintiff and others permission to return to work. In December 1970, citing the cessation of this demand, the Trustees adopted a blanket resolution withdrawing for all the 1968 grant of permission;[2] plaintiff, fearing the loss of his pension, retired once again. After unsuccessfully pursuing state administrative remedies,[3] he sought redress in the United States District Court for the Southern District of New York. The principal theory of his complaint was that the 1970 resolution violated the Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621 et seq., because it was motivated by his union's desire to replace older engineers with younger workers who would enrich the union's coffers by paying high training school and initiation fees.[4] Judge Harold R. Tyler, Jr., granted defendants' motion for summary judgment and dismissed the complaint. 355 F. Supp. 89 (1973). Plaintiff thereafter filed an amended complaint, alleging that because the 1970

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2 The 1970 Resolution provided:

> WHEREAS, the emergency need for Marine Engineers brought about by the Vietnam War no longer exists,
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> IT IS HEREBY RESOLVED by the Trustees that each permission heretofore granted by the Trustees to a pensioner to return to Covered Employment pursuant to Section 14 of Articles II and II-A of the Regulations shall be terminated effective April 1, 1971, or the termination date of any voyage on which he is then sailing, whichever is later, and it is further
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> RESOLVED, that the Administrator shall so advise each affected pensioner of this resolution.

3 Plaintiff's charge of age discrimination under New York law was dismissed on the merits by the State Division of Human Rights in May 1971. The State Human Rights Appeal Board affirmed in December 1971, both on the merits and on jurisdictional grounds.

4 Plaintiff alleged that half of the Trustees were representatives of the union and that the union president was chairman of the Board of Trustees.

resolution was improperly motivated, the pension fund was not being administered in accordance with the requirements of section 302 of the Taft-Hartley Act, 29 U.S.C. § 186. In an unpublished opinion, Judge Tyler dismissed the amended complaint for lack of subject matter jurisdiction, holding that it asserted at most a breach by the Trustees of their fiduciary responsibilities under state law.[5]

We affirm the decisions of the district court. The Age Discrimination in Employment Act provides that it shall not be unlawful for a labor organization "to observe the terms of . . . any bona fide employee benefit plan such as a . . . pension . . . plan, which is not a subterfuge to evade the purposes of this chapter. . . ." 29 U.S.C. §623(f)(2). MEBA Pension Trust was established in 1955, long before the passage of the Act, and pays substantial benefits to a broad class of workers. Thus, the Trust is certainly not itself a subterfuge to evade the purposes of the statute. We put to one side whether this does not end plaintiff's claim under the Act and assume arguendo that the Act applies to improper administration of a bona fide pension plan. Even on this assumption, however, plaintiff's action must fail. He was not, because of his age, forced to retire in 1964; he did so voluntarily. And he does not contend that the Trustees acted illegally in making complete withdrawal from the industry a prerequisite to a pension.[6] That condition was equally imposed upon all and its legitimate

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5 Various state law claims by plaintiff were also dismissed for lack of pendent jurisdiction. These claims are not involved in this appeal.

6 Plaintiff does claim, however, that at the time of his first withdrawal the Trustees followed a "swinging door" policy, granting permission to return to work in the industry without loss of pension rights as a matter of course. But this contention flies in the face of the pension trust regulations and plaintiff's own signed statement of withdrawal, see note 1 supra, and on the motion for summary judgment, he offered no evidence of the existence of such a policy beyond his own assertion that it was well known in the industry.

purpose—to protect the pension fund from exhaustion by those who would use their benefits as unemployment insurance or to support extended sabbaticals—is readily apparent. Nor does he deny that the "complete withdrawal" policy, suspended during a period of peak wartime demand for marine engineers, was reinstated at a time when that demand ceased. Against this background, plaintiff even on a motion for summary judgment had the burden of setting forth some facts to show that the blanket reinstatement of the original unattacked policy was discriminatory. As Judge Tyler properly held, 355 F. Supp. at 92, plaintiff failed to do so,[7] offering instead "mere conclusory allegations."[8]

This reasoning also requires dismissal of the Taft-Hartley Act claim of the amended complaint, although Judge Tyler dismissed it on a different basis.[9] Plaintiff contends

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7 On this view of the age discrimination claim, we need not review the district court's alternative holding that defendant pension trust was not a "labor organization" or agent thereof within the meaning of the Act. 29 U.S.C. § 630(d). We also decline to consider at this time the argument of amicus curiae, National Senior Citizens Law Center, that the Act prohibits involuntary retirement pursuant to a pension plan before age 65. As noted in text, plaintiff did not take this position in the district court.

8 In his only affidavit in opposition to defendants' motion for summary judgment on the original complaint, plaintiff simply stated a belief that the 1970 resolution was designed to discriminate against older workers without indicating the source of this belief.

9 As noted earlier, Judge Tyler dismissed this claim for want of subject matter jurisdiction, holding that §§ 302(c)(5) and (e) of the Taft-Hartley Act, 29 U.S.C. §§ 186(c)(5) and (e), did not confer jurisdiction upon the federal courts to entertain a suit alleging mal-administration—as distinguished from structural defects—in covered pension plans. Whether this was a proper characterization of the law and what constitutes a structural defect raise difficult and complicated issues. Compare *Snider* v. *All State Administrators, Inc.*, 481 F.2d 387 (5th Cir. 1973), cert. denied, 94 S.Ct. 771 (1974), and *Bowers* v. *Ulpiano Casal, Inc.*, 393 F.2d 421 (1st Cir. 1968), with *Lewis* v. *Mill Ridge Coals, Inc.*, 298 F.2d 552, 558 (6th Cir. 1962) (dictum), *Lugo* v. *Employees Retirement Fund*, 366 F. Supp. 99 (E.D.N.Y. 1973), and *Porter* v. *Teamsters Health Funds*, 321 F. Supp. 101 (E.D. Pa. 1970). In view of the insubstantiality of plaintiff's case on the merits, we express no opinion on these issues.

FOOTNOTES

1. Although a motion for summary judgment does not go to the issue of jurisdiction, pursuant to Rule 12(b), F.R. Civ.P., this court is empowered to dismiss an action at any point if it determines that it lacks subject matter jurisdiction.

2. In substance, these requirements are that:

(1) payments must be held in trust to pay, from principal or income, for employees' medical care, pensions, illness, etc.;
(2) the detailed basis of such payments must be specified in writing;
(3) employees and employers must be equally represented and there must be a neutral person or umpire to break deadlocks;
(4) there must be provisions for an annual audit; and
(5) separate trusts for pension and annuity funds must be provided.

3. Interestingly enough, in one of the few D.C. labor cases in which jurisdiction was discussed, the court held that it had jurisdiction under its general equity powers and also under a third party beneficiary theory. Kennet v. United Mineworkers of America, 183 F. Supp. 315 (D. D.C. 1960).

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that the Trustees, in adopting the 1970 resolution, were administering the pension plan for the institutional benefit of the union, rather than "for the sole and exclusive benefit of the employees" as required by section 302(c)(5) of the Act, 29 U.S.C. §186(c)(5). This contention, however, requires very much the same showing of improper motivation as the Age Discrimination Act claim and rests upon virtually the same inadequately substantiated allegations.[10] Consequently, we hold that plaintiff has failed to raise any genuine issue of material fact necessitating trial of his Taft-Hartley Act claim.

Judgment affirmed.

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10 The principal additional piece of evidence proffered was a letter from the president of the union to another retiree seeking to return to work. This letter says essentially that reinstatement of retirees is not practical given the financial structure of the pension plan.